

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

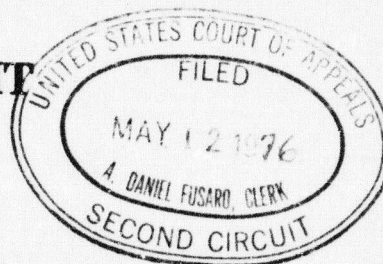
76-5018

To be argued by
RICHARD deY. MANNING

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



In Re

PROVINCIAL REFINING COMPANY LIMITED

and

NEWFOUNDLAND REFINING COMPANY LIMITED,

Bankrupts.

THE CLARKSON COMPANY LIMITED, as Trustee in Bankruptcy,
appointed by the Supreme Court of the Province of Newfoundland,
of the property of Newfoundland Refining Company Limited and
Provincial Refining Company Limited,

Plaintiff-Appellee,

-against-

JOHN M. SHAHEEN, ROY M. FURMARK, ALBIN W. SMITH,
PHILIP GANDERT, PETER L. CARAS, PAUL W. RISHELL,
WILLIAM J. SHERIDAN, and JOHN DOE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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I. STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

Did the Court below err in issuing the ex parte temporary restraining order against defendants and thereafter, following a hearing on affidavits, converting the restraining order into a preliminary injunction?

(a) Was the evidence before the Court insufficient to sustain the findings of fact required to support the restraining order and preliminary injunction?

(b) Should the Court have declined to decide the question of whether or not to grant comity to Clarkson, as Trustee, when the same question was pending before the State Courts?

(c) Assuming the answer to (b) in the positive, did the Court err in granting comity to Clarkson, as Trustee?

(d) Was the complaint defective for lack of indispensable parties, the presence of which would have deprived the Court of diversity jurisdiction?

(e) Was the Court below deprived of jurisdiction because of a prior in rem action in the State Court by Clarkson, as Trustee?

(f) Were the restraining order and preliminary injunction fatally defective because no undertaking was required of Clarkson?

We respectfully submit the answer to all of the foregoing questions is in the affirmative.

II. STATEMENT OF THE CASE

The Parties

Plaintiff: The Clarkson Company Limited, ("Clarkson"), a Canadian corporation licensed under Canadian law as a Bankruptcy Trustee, here purportedly Trustee in Bankruptcy of two Newfoundland corporations, Newfoundland Refining Company Limited ("NRC") and Provincial Refining Company Limited ("PRC"), pursuant to an order of the Newfoundland Supreme Court on March 12, 1976.*

Defendants: Six individuals, residents of New York, who were officers and directors of NRC and PRC ("defendants").

This action was commenced on March 23, 1976, by the filing of a complaint (App. 3) seeking the following relief:

- "1. Enjoining defendants and their agents, servants, employees and attorneys...from destroying, altering, secreting or removing any books or records of NRC or PRC;
- "2. Requiring defendants and their agents, servants, employees and attorneys...to deliver immediately into the possession and control of plaintiff [Clarkson as Trustee] all books and records of NRC and PRC;
- "3. Enjoining defendants and their agents, servants, employees and attorneys...from disposing, disbursing, secreting or removing any property of NRC and PRC;
- "4. Requiring defendants and their agents, servants, employees and attorneys...to

*The background of this case is set forth in a Memorandum of Facts filed herein (App. 130).

deliver into the possession and control of Clarkson all property of NRC and PRC; and "5. For such other and further relief as to the Court may seem just and proper."

On the same date, by Order to Show Cause with a Temporary Restraining Order (App. 8), Clarkson obtained from the Court below (per R. Owens, D.J.) an ex parte restraining order, enjoining defendants as follows:

"(1) [Defendants] Are restrained from transferring any of the books and records of NRC and PRC from their present location and from destroying, altering or secreting any of the books and records of NRC and PRC;
"(2) [Defendants] Are directed to give Clarkson immediate and continuing access to the books and records of NRC and PRC with the right to inventory examine and copy; and
"(3) [Defendants] Are restrained from disbursing, removing or secreting any other property of NRC or PRC in their custody or control." (App. 9)

No bond was required of Clarkson by the Court.

On March 25, 1976, defendants filed an affidavit in opposition to the Restraining Order and asked that the Order be vacated (App. 66), and which was denied the same day, from which defendants appealed (App. 246).

On April 1, 1976, an oral argument was held before the Court below (App. 391) on additional affidavits (App. 248-323) and memoranda of law (App. 361-390), and the Court continued the Restraining Order as a Preliminary Injunction on the following findings:

"...I make a finding that Clarkson is the trustee in Newfoundland and there is entitled to the books and records, were they located in Newfoundland.

"Under comity it is conceded I have the power to turn them over to a validly appointed trustee, and as far as I am concerned this is not the Court to collaterally attack that appointment. If there is to be such an attack, it is in Newfoundland not before this Court. These books are concededly in the control and in the possession of the defendants here.

"Along the way I wish to note that I reject the abstention argument because there is no state law question or similar question to be resolved first by a state court as to which I should abstain.

"I find that consent was in fact given to examine all of these books in the letter of February 17th, 1976, which is marked Court's Exhibit A.

"I find that given the history of steps before me starting with March 23rd, when I signed this order based upon a concern of the moving party that these documents might be destroyed or disappear, that there is certainly some substantial evidence that that is a risk, finding as I do that on the 24th an order was obtained from a Supreme Court judge in New York County which was used to block the examination on that day until that was vacated, and counsel for defendants coming into this court on the evening of the 25th and stating to me that when my order had been presented he had declined to honor it and had said that he had thrown the order presenter out and demanding that I vacate the order forthwith because I had no power or authority to enter it.

"These are, in my judgment, strong evidence of an effort to block this inquiry, to block access to these books to which, as I say, I find the trustee has an absolutely lawful right. And I find that there is an enormous risk of irreparable injury to the trustee here were they not turned over, and that they may well be destroyed or vanish and be unavailable at the time the trustee has a lawful need for them.

"Now, given the agreement of February 17th, Court's Exhibit A, it would similarly appear there is little hardship if these books are in fact turned over to the trustee under the rules of comity, and we will just turn the situation around. Those of the defendants who wish to copy books in the trustee's possession may have the right to do so.

"Consequently, I am making my temporary restraining order the preliminary injunction and I am directing that Clarkson be given forthwith the books and records of NRC and PRC in the custody of the defendants in this case or their agents, servants, employees or attorneys or any other persons in active participation with them, with the proviso that they may make appropriate copies thereof at convenient times and places." (App. 419-421)

The Court also added:

"THE COURT: I'll tell you what I'll do. I will order that any property of the bankrupt that comes into the possession of any defendant is to be retained. This would, I assume, include any accounts receivable that are in fact paid, any--" (App. 428)

From this Order, defendants appealed, first seeking a stay from this Court which was denied on April 6, 1976, and thereafter seeking a rehearing or stay pending a filing of a petition for a writ of certiorari, which was denied.

This appeal is on the merits of the granting of the Temporary Restraining Order on March 23, 1976, and the Preliminary Injunction on April 1, 1976.

Prior to the filing of the complaint herein, the sole stockholder of NRC and PRC filed a derivative stockholder's action in the New York Supreme Court ("the State Court Action"); by amended complaint and leave of the Court granted March 11, 1976, Clarkson and a number of others were named as fraudulent co-conspirators in a scheme, described below, directed against NRC and PRC (App. 204-233).

In the Court below, defendant's counsel introduced an affidavit, with exhibits, among which was a Memorandum of Facts filed in the State Court Action, with supporting exhibits. The Memorandum and certain relevant exhibits are included in the Appendix (App. 130-170). It is submitted that the allegations contained in the Memorandum of Facts, unchallenged in the Court below, must be taken as true for the purpose of this appeal.

The allegations in the State Court Action are, so far as they are here relevant, essentially:

(1) The jurisdiction of the Bankruptcy Court in Canada was invoked by reason of a fraudulent conspiracy among the defendants therein and others named in the State Court Action (App. 233-235).

(2) The Canadian bankruptcy proceedings were instituted solely by Atlantic Trading (Delaware) Inc. ("Atlantic"), a

Delaware corporation whose principal office is in New York City, as assignee of some \$350 million of claims illegally acquired by it in violation of Section 489 of the New York Judiciary Law; such assignment rendered such claims uncollectable, under New York law, and therefore such claims could not properly be asserted against NRC or PRC (App. 233, ¶57(c)).

(3) The entire bankruptcy proceeding was instituted in violation of a forum selection clause in an Agency Agreement (App. 230, ¶47(d)), which was assigned to Atlantic as a part of the overall assignment of claims, which was a violation of the public policy of New York (App. 233, ¶57(c)).

III. ARGUMENT

(A) Preliminary

This action was commenced in the court below in the style and caption of a Federal Bankruptcy action (App. 3), as it is so captioned herein.

It is not a Federal Bankruptcy Action and should not have been so styled.

In every Bankruptcy case the bankrupt corporation must first be properly brought before the Court:

In the old Federal Court equity receiverships, the creditor brought an action against a debtor under diversity jurisdiction. Lion Bonding Surety Co. v. Karatz, 262 U.S. 77 (1923)

Under Chapter X of the Bankruptcy Act (11 USC §501 et seq.), the corporation may bring itself before the Court by filing a voluntary "petition" (B'ruptcy Act §126, 11 USC §526) or three or more creditors or an indenture trustee may file an involuntary "Petition", in which case the petition together with a summons must be served upon the debtor (B'ruptcy Act §18(a) 11 USC §41(a)).

Similarly in the case of a partnership bankruptcy, where the petition is signed by less than all partners, proper service must be effectuated on the partnership (B'ruptcy Act §18(a) 11 USC §41(a)).

In all such cases the alleged involuntary bankrupt has an opportunity to be heard on the petition (B'krupcy Act §§18(b), 136; 11 USC §§41(b), 536).

Here, the two corporations whose files, documents and property are sought, NRC and PRC, both Newfoundland corporations licensed to do business in New York, have never been brought before this Court.

This is a diversity of citizenship case (App. 4) in which Clarkson, a Canadian corporation having no standing whatsoever in this jurisdiction, filed an action claiming to be Trustee of NRC and PRC by appointment of the Newfoundland Court, and demanding that the defendants, individual officers and directors of NRC and PRC, turn over to Clarkson the books, records and property of NRC and PRC.

(B) The Court below lacked sufficient evidence upon which to grant the Temporary Restraining Order and the Preliminary Injunction

(1) The Temporary Restraining Order

As was called to the attention of the Court below by affidavit filed two days after the Temporary Restraining Order was granted, the affidavit filed in support of that order was based entirely on hearsay evidence and was thus not a proper basis for the issuance of the order (App. 66). Federal Rule 65(b) requires that a Temporary Restraining Order must be based on "specific facts shown by affidavit". There were no such specific facts to support the Temporary Restraining Order.

Mr. Barist, the attorney who prepared the supporting affidavit, later admitted the hearsay character of his affidavit and sought to "patch it up" at the hearing by filing an

affidavit of a Clarkson official who, after the fact, purported to verify Mr. Barist's hearsay statements (App. 250).

The aforementioned affidavit filed on defendants' behalf (App. 66) also showed the Court that the books and records of NRC and PRC had been turned over to Clarkson, by voluntary agreement on February 17th (App. 113), and it was hardly likely that the officers of NRC or PRC would suddenly begin to destroy such books and records, of which Clarkson already had knowledge and possibly copies. No irreparable injury whatsoever was threatened.

(2) The Preliminary Injunction

The basis for the granting of the Preliminary Injunction was stated as follows:

"I find that given the history of steps before me starting with March 23rd, when I signed this order based upon a concern of the moving party that these documents might be destroyed or disappear...." (App. 419)

As previously indicated, the Court below was, by this time, aware of the fact that the Temporary Restraining Order of March 23rd was erroneously issued as being based entirely on hearsay evidence (App. 70-74, 250)

"...that there is certainly some substantial evidence that that is a risk, finding as I do that on the 24th an order was obtained from a Supreme Court judge in New York County which was used to block the examination on that day until it was vacated...." (App. 419-20)

The Order of the State Court was not sought to "block the examination" which had commenced on February 17th, but was a general stay of Clarkson acting as Trustee of NRC and PRC in New York until a Court of competent jurisdiction recognized it as such (App. 181).

"...and counsel for defendants coming into this court on the evening of the 25th and stating to me that when my order had been presented he had declined to honor it and had said that he had thrown the order presenter out and demanding that I vacate the order forthwith because I had no power or authority to enter it."
(App. 420)

There is not one single bit of evidence in the record to support such a finding. Mr. Hoover made no such charge in his affidavit (App. 249), and the only reference in the record is to the contrary (emphasis added):

THE COURT: Mr. Manning, before you start, when was it you were in to see me?

MR. MANNING: Friday last.

THE COURT: The 26th.

MR. MANNING: Yes, about 5:00 o'clock.

THE COURT: I'm sorry. Was it the 26th or the 25th? It was on the 25th.

You were here on the 25th. You will recall that I asked you about this order and we had a little conference over here at the side bar.

MR. MANNING: That is correct.

THE COURT: And you made the statement that I had no right to issue that order and that when the people came to look at these books, in words or in substance, you said you threw them out. Do you remember making that statement to me?

MR. MANNING: Yes, sir, I do.

THE COURT: Now, was that based on Judge Tyler's order?

MR. MANNING: No, your Honor, it was not.

THE COURT: Whose order was that based on?

MR. MANNING: Perhaps I did not explain to your Honor at that time the sequence of events. You will recall that when I made that statement you had before you the letter agreement between NRC and PRC and Clarkson where we had voluntarily turned the records over to them on the 17th day of February and which permitted them to occupy our offices from that day forward. [App. 113]

Now, when we threw them out is when we stopped the voluntary cooperation and there started this chain of events.

We have at no time, and I don't think there has been such a charge levied, violated the order of this Court. They have had those records since the moment we knew of the existence of your order.

THE COURT: I recall with some clarity that on the afternoon of the 25th you said that when someone came to your office with my order to look at these books you threw them out.

MR. MANNING: I don't think I was speaking of that point in time, your Honor.

THE COURT: It had to do with my order and it had to do with your saying that I had no power or authority to enter that order and that your request of me, if I may put it in a mild form, was that I should vacate that order immediately.

MR. MANNING: Yes, sir, that was my request.

THE COURT: And I just want to be sure of the as to the time. This was the afternoon of the 25th, because it followed an argument that I had heard earlier that day for an injunction of a merger. So I can fix that in point of time. All right. Go ahead. I just wanted to be sure I understood when that happened." [App. 407-09]

The Court went on, based on such unfounded and unsupported findings, to conclude:

"These are, in my judgment, strong evidence of an effort to block this inquiry, to block access to these books to which as I say, I find the trustee has an absolutely lawful right. And I find that there is an enormous risk of irreparable injury to the trustee here were they not turned over, and that they may well be destroyed or vanish and be unavailable at the time the trustee has a lawful need for them." (Emphasis added)

It is indeed astonishing that the Court could even find any element of risk that records, which had been voluntarily made available to Clarkson over a month before (App.113), would all of a sudden (for some reason not stated in this record) begin to "vanish".

The records which were, by the Court's Order, turned over to Clarkson, are required for litigation in actions in the State Court to endeavor to collect for NRC and PRC and their creditors, nearly one quarter billion dollars (App. 204)*.

It is respectfully submitted that there was and is no factual basis for the findings made to support either the Temporary Restraining Order or the Preliminary Injunctions.

*One wonders why Clarkson, supposed Trustee, is doing everything in its power (including moving the records to Toronto; see affidavit of Richard deY. Manning, sworn to April 14, 1976, in this Court in support of Motion for Rehearing or Stay) to thwart the efforts of the stockholders of NRC and PRC to protect the interests of those companies.

While not so stated in its complaint, a necessary prerequisite to its right to the relief sought in the complaint was that Clarkson be granted recognition by way of comity as a foreign Trustee of NRC and PRC.

In the face of an affidavit filed below charging that Clarkson was a co-conspirator with a number of other corporations -- all of whom have offices in New York -- the very purpose of which was to fraudulently deprive NRC and PRC of their rights under a New York forum selection clause, and to fraudulently cause the bankruptcy of NRC and PRC (App. 66-90; 4-238), and with no denial whatsoever of such charges before the Court, the Court below granted Clarkson recognition by way of comity as Trustee of NRC and PRC (App. 419) and continued the Temporary Restraining Order as a preliminary injunction ordering the individual defendants to turn over files and records of NRC and PRC to Clarkson (App. 420-421) which promptly spirited them off to Canada (Aff. of Richard deY. Manning, filed herein on April 14, 1976, in support of a motion for Rehearing or Stay).

(C) Whether to grant comity to Clarkson is a question of State law, which should have been decided by the State Court

(1) Since the question below involved questions of public policy of the State of New York, the State Court was the proper forum for the making of the decision of whether or not to grant comity to Clarkson

The Court below, with respect to the granting of comity, made no investigation whatsoever of the fraud charges and violations of New York public policy raised by defendants and simply held:

"I make a finding that Clarkson is the Trustee in Newfoundland and there is entitled to the books and records, were they located in Newfoundland.

"Under comity, it is conceded I have the power to turn them over to a validly appointed trustee, and as far as I am concerned, this is not the court to collaterally attack that appointment. If there is to be such an attack, it is in Newfoundland not before this Court."
(App. 419)

It is contended that the Court should not have prejudged this matter of State law; and in any case, the Court's ruling that "this is not the Court to collaterally attack that appointment" is clearly contrary to the law of New York where fraud and violation of New York public policy are charged.

For this Court to appreciate why the question of fraud and New York public policy are so important in this case, the history of the matter must be explained to some extent.

The most critical point is that the Genesis of this litigation rests in New York, not in Canada, and all matters relating to this case are dependent on interpretations of New York law.

In documents filed with this Court, it has been alleged that the Canadian bankruptcy proceeding was the culmination of a scheme designed to defraud NRC and PRC of their contract rights under New York law (App. 66-90; 204-238). The action filed herein is but another step in the carrying out of that conspiracy. No denial of such allegations under oath or otherwise has ever been made.

The District Court gave no heed whatsoever to the clear principle of New York law that there are exceptions to the general rule granting comity to decisions of foreign courts: Where it is alleged that a foreign judgment was procured by fraud or violates the public policy of New York, that is grounds for disregarding the foreign judgment.

Here is a case where a foreign appointed trustee -- itself a defendant in the prior pending state court action* -- sought to circumvent the State Court's jurisdiction, and brought this action in the Federal Court seeking to be recognized

*Clarkson sought, in the Court below, to create the impression that it was named as defendant on March 12th, the day it was named Trustee by the Newfoundland Court (App. 379); reference to the original complaint filed in the State Action (App. 344 & 347) will show that Clarkson was referred to, but not named as it was in the Amended Complaint (App. 226, 229); moreover, the Amended Complaint was verified March 8, 1976 not March 12, 1976, as alleged by Clarkson (App. 338).

in New York by comity as Trustee of NRC and PRC (both of which are licensed to do business in New York).

Under the circumstances, it is submitted that the Court below erred in (a) not waiting until the State Court had an opportunity to pass upon the question of whether or not to grant comity to Clarkson, or (b) if it was not required to stay its hand, in incorrectly applying the law of New York in its decision on the question of comity.

It is established that actions, orders and appointments by foreign bankruptcy courts* have no legal standing in the Courts of the United States or New York:

(a) Foreign discharge in bankruptcy is no defense in a United States action or contract. McMillan v. McNeill, 17 U.S. 209 (1819), per Marshall, C.J. Phelps v. Borland, 103 N.Y. 406 (1886).

(b) Foreign appointment of a Receiver, Trustee, or other similar functionary gives him no legal standing in New York. What standing may be granted, is by way of comity only. Oakey v. Bennett, 52 U.S. 33 (1851); In re Waite,

*In the Court below, Clarkson argued that receivers from another state are treated the same as those from other nations (App. 58). This of course is totally falacious and overlooks entirely the "full faith and credit" clause of the U.S. Constitution. Compare Booth v. Clark, 58 U.S. 322 (1855) (which denied the New York receivers authority to bring suit outside New York because such authority was not granted by his appointment) with Converse v. Hamilton, 224 U.S. 243 (1912) (which held that where the receivers' authority was that of a statutory quasi assignee, he was entitled to bring suit in another state under the full faith and credit clause).

99 N.Y. 433 (1885); Vladikavkazsky Ry. Co. v. New York Trust Co. 263 N.Y. 369 (1934); Koninklijke Lederfabriek "O" v. Chase Nat. Bank, 30 N.Y.S. 2d 518 (1st Dept. 1941).

(c) Canadian bankruptcy orders and other judgments are not per se entitled to comity. Bank of Buffalo v. Vesterfelt, 232 N.Y.S. 2d 783 (Co. Ct. Erie Co. 1962).

In Johnston v. Compagnie General Transatl., 242 N.Y. 381 (1926), the Court of Appeals squarely held that the question of the granting or withholding of comity was a matter of New York not Federal law.*

When the Supreme Court was presented with a question of the local policy of a state with respect to the status of a liquidator from another state, it did not feel that it was competent to decide that question (Clark v. Williard 292 U.S. 112 (1934)); the Court in a later decision in the same case characterized its earlier decision as follows (emphasis added):

"The decree was accordingly vacated and the cause remitted to the state court to the end that the local policy might be made known through the one voice that could declare it with ultimate authority."

(Clark v. Williard, 294 U.S. 212-13 (1935))

If the Supreme Court of the United States defers to the state courts on the question of the standing or title of

*See also Republic of Iraq v. First Nat. Bank of Chicago, 350 F. 2d 654 (7th Cir. 1965); Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F. 2d 435, 440 (3rd Cir. 1972); Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D.C. Mass. 1966).

another state's receiver, a fortiori the United States District Court should have done so with respect to granting or withholding of comity to a Trustee from another country. It is not contended that such rule would apply in every situation; it is contended that such rule apply where substantial questions of the public policy of the state are involved.

So, in an earlier case, Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 579-80 (1908), dealing with the question of the standing of a foreign creditor suing on behalf of the estate of a foreign bankrupt the Supreme Court held (emphasis added):

"The doctrine of comity has been the subject of frequent discussion in the courts of this country when it has been sought to assert rights accruing under assignments for the benefit of creditors in other States as against the demands of local creditors, by attachment or otherwise in the State where the property is situated. The cases were reviewed by Mr. Justice Brown, delivering the opinion of the court in Security Trust Company v. Dodd, Mead & Co., 173 U.S. 624, and the conclusion reached that voluntary assignments for the benefit of creditors should be given force in other States as to property therein situated, except so far as they come in conflict with the rights of local creditors, or with the public policy of the State in which it is sought to be enforced; and, as was said by Mr. Justice McLean in Oakey v. Bennett, 11 How. 33, 44, 'national comity does not require any government to give effect to such assignment [for the benefit of creditors] when it shall impair the remedies or lessen the securities of its own citizens.'

"There being, then no provision of positive law requiring the recognition of the right of the plaintiff in error to appropriate property in the State of Wisconsin and subject it to distribution for the benefit of foreign creditors as against the demands of local creditors, how far the public policy of the State permitted such recognition was a matter for the State to determine for itself...."
[Emphasis added]

It is believed that these cases make it crystal clear that the state courts, and only the state courts are qualified to decide questions of comity based on public policy unless there is a general rule of State law to which the Federal Court can look for proper determination of the state law.

Again, the first decision in Clark v. Williard, supra, specifically dealt with this point:

"We have no thought to impose our reading of the local statutes and decisions upon the courts of the locality. What we are about to say as to their meaning does no more than explain the grounds for our understanding that the courts of Montana have left the question open. If the law were clear beyond debate, as counsel for the respondents has contended that it is, our duty might be to dispose of the entire controversy now instead of remanding it to the state court for further action there."

Where, as here, the state court had the identical question of the standing or lack thereof of Clarkson before it, where fraud and a question of violation of public policy was involved, the District Court should have permitted the State Court to decide the question.

It is respectfully suggested that Clark v. Williard and Disconto Gesellschaft v. Umbreit, supra, represent clear authority for Federal "abstention" where the granting or withholding of comity to a foreign receiver or trustee is involved. See Railroad Commission v. Pullman, 312 U.S. 496 (1941); City of Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942).

(2) Clarkson's appointment as Trustee was alleged -- and not denied -- to have been tainted with fraud

The New York Court of Appeals in Johnson v. Compagnie Transatl., 242 N.Y. 381 (1926) quoted with approval the real gist of Hilton v. Guyot, 159 U.S. 113 (1895), as follows:

"In England and in the colonies subject to the law of England, the fraud alleged in its [the French judgment] procurement would be sufficient grounds for disregarding it." (242 N.Y. 387-88)

The New York Courts have consistently recognized the fraud exception in the granting of comity to actions by foreign courts (emphasis added):

Lazier v. Westcott, 26 N.Y. 146, 151 (1862)
("It remains competent for the defendant to show that....the [foreign] judgment was fraudulently obtained.")

Dunstan v. Higgins, 138 N.Y. 70, 74 (1893)
("It [the foreign judgment] can be impeached
...by proof...that it was procured by means
of fraud....")

Cowans v. Ticonderoga Pulp & Paper Co., 219
N.Y.S. 284, 286 (3rd Dept.), aff'd 246 N.Y.
603 (1927) ("A judgement recovered in a
foreign country...is conclusive...subject,
however, to certain well recognized exceptions,
namely, where the judgement is tainted with
fraud or with an offense against the public
policy of the state....")

Martens v. Martens, 284 N.Y. 363, 365-66 (1940)
("They [foreign judgments] must not contra-
vene our public policy....The acts of the
parties to the foreign litigation in invoking
the jurisdiction must also sometimes be scru-
tinized. This can best be done at a trial
where the court has all of the facts before
it....")

Coudenrove-Kalergi v. Dieterle, 36 N.Y.S. 2d
313 (Sup. Ct. N.Y.Cty. 1942) ("...and there
is nothing to show...fraud in the procuring
the judgment....")

In re Topcuoglu's Will, 174 N.Y.S. 2d 260, 263
(Surr.Ct., Suff. Cty. 1958) ("...I hold that
since the Turkish adoption order was the re-
sult of a fraud practiced upon the Turkish
court, said order although valid in its face
can be gone back on and attached by any in-
terested party in this proceeding.")

Falcon Manufacturing (Scarborough) Ltd. v. Ames,
278 N.Y.S.2d, 684, 686 (Civ.Ct.N.Y.Cty. 1967)
("...where the judgment is tainted with fraud
or with an offense against public policy...it
will not be given any effect by our Courts.")

These decisions were codified in 1970 in the New York
CPLR §5304:

"Other grounds for non recognition. A foreign country judgment need not be recognized if:

"...

"the judgment was obtained by fraud."

While this new provision is limited for foreign judgments for the payment of money and thus not applicable to foreign bankruptcy court actions*, it cannot be ignored in expressing legislative intent and public policy.

It is submitted that the allegations of fraud in the State Court Action which were brought to the attention of the Court below and which were not denied by Clarkson were sufficient to cause the withholding of comity to Clarkson until the charge had been reviewed by the State Court.

(3) All of the claims asserted by Atlantic in the Canadian bankruptcy were acquired in New York in violation of New York law and were barred from collection under New York law

Atlantic, the only petitioning creditor in the bankruptcy decree -- and the creditor who proposed Clarkson as Trustee (App. 24, 29) -- acquired all of its claims against NRC and PRC by assignments dated December 31, 1975 and January 30, 1976 (App. 159-60), six weeks and two weeks, respectively, prior to

*Presumably the Legislature did not contemplate such an intricate method of circumventing New York public policy as here invoked.

the institution of the proceedings in bankruptcy in Canada (App. 163).

The claims were clearly acquired by Atlantic in violation of New York Judiciary Law §489, which provides, in its relevant part:

"...[n]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon...."

The New York cases have made it crystal clear that this section of the law is expressive of a strong public policy against such assignments:

Bennett v. Supreme Enforcement Corp., 293 N.Y.S. 870 (App. Div 1st Dept. 1937) aff'd, 275 N.Y. 502.

Zindle v. Friedman's Express, Inc., 17 N.Y.S. 2d 594 (App.Div. 1st Dept. 1940) ("As the assignment...was in contravention of the Penal Law [now §489 of the Judiciary Law] and was illegal, plaintiff, whose only interest in the claims was based upon such assignments, may not recover thereon. 'No person can maintain an action to which he must trace his title through his own breach of the law.'")

Sprung v. Jaffe, 3 N.Y. 2d 539 (1957) ("If it be found at the trial that plaintiff did in fact violate section 274 of the Penal Law [now §489 of the Judiciary Law] a dismissal of his complaint is required.")

Inland Credit Corp. v. Puro, 277 N.Y.S. 2d 1015 (App. Div. 2nd Dept. 1966) and Puro v. Puro, 298 N.Y.S. 2d 111 (2nd Dept. 1969) (In the first case the assigned assignee was held to be barred from asserting the claim; thereafter the claim was reassigned to the assignor and the court refused a summary judgment thereon: "The time honored public policy of avoiding the enforcement of champertous transactions should not be brushed aside merely on the claim that the reassignment was for value and with no purpose to confer benefit on the original assignee....Thus, whether the reassignment purified the earlier champerty...or was simply a continuation of the same violation is a question of fact....")

Fairchild Hiller Corp. v. McDonald Douglas Corp., 28 N.Y. 2d 325, 329 (1971) ("Time honored public policy is reflected in the purpose of the statute....")

In the Fairchild case, the plaintiff assignee, Fairchild, was held not to have violated section 489 because it acquired all the operating assets of Republic Aviation Corp:

"Since the operating assets obtained by Fairchild included all outstanding contracts and their related claims, Fairchild acquired Republic's claim against McDonald....

"After two years of unsuccessful negotiations to settle the claim, Fairchild, as assignee, brought this action against McDonald seeking fifteen million dollars in damages...." (28 N.Y. 2d at 329-30)

"....[T]he undisputed facts in this case....establish that Fairchild did not receive the assignment of the claim for the sole and primary purpose of bringing an action on the assignment. Fairchild's primary purpose, as the record indicates, was to acquire Republic's operating assets. The acquisition of the claim was simply as incidental part of a substantial commercial transaction...." (28 N.Y. 2d at 330)

Atlantic, in an attempt to justify its illegal position of the assigned claims, has sought to invoke the Fairchild Hiller exception but it "will not stretch". Here, the only assets assigned were the claims against NRC and PRC; whereas in Fairchild Hiller all operating assets of a going concern were assigned which, incidentally, included the claim against McDonnell. Whereas Fairchild Hiller negotiated for two years to try and collect the claim, Atlantic moved six weeks after the first assignment and two weeks after the second assignment.

In any event, where a violation of Section 489 is charged, the rule is clear that a full disclosure of all relevant facts must be made and the matter cannot be decided on affidavits (Fairchild Hiller v. McDonnell Douglas, Puro v. Puro and Sprung v. Jaffe, supra).

It is respectfully submitted that where claims which are unenforceable under New York law are used to invoke the jurisdiction of a foreign bankruptcy court which honors such barred claims, the Trustee appointed on the application of the holder of such barred claims should be given no comity in New York as being in violation of New York's public policy.

(4) Clarkson's appointment as Trustee was predicated upon an express violation of a New York "Forum Selection" clause, and thus against the public policy of New York.

It is submitted that a novel question of State law is presented in this case, and in the case pending in the State Court Action, which requires careful examination, that is:

Where a New York corporation enters into a contract in New York with a foreign corporation, in which it is provided that "any dispute" arising thereunder "shall be submitted for determination by a New York Court", can the New York contracting party breach the agreement and invoke the jurisdiction of a foreign court which refuses to enforce the forum selection clause and thus escape the New York Court's jurisdiction for which it contracted?

That is exactly what happened in this litigation. Ataka America, Inc., a New York corporation, entered into an Agency Agreement in New York with NRC to provide the financing of crude oil purchases by PRC for the refinery at Come By Chance, Newfoundland (App. 171). The Agency Agreement contained the following provision:

"X) This agreement shall be construed in accordance with the laws of the State of New York and any dispute arising between the parties shall be submitted for determination by a New York court." (App. 176)

Under the Agency Agreement some \$350,000,000 of financing was supplied by Ataka America to NRC and PRC under which notes, bills of exchange, and other debt instruments were issued, principally in New York (App. 134).

NRC and PRC contend that none of said amounts were due and payable to Ataka because of a number of provisions in the Agency Agreement, including the following:

"In the event of any breach at anytime of any of the terms, conditions and agreements hereof except for causes deemed Force Majeure then at such time as the event occurs, all outstanding obligations shall immediately become due and payable...." (App. 175-76)

NRC and PRC contend that no breach had occurred (nor has one even been alleged by Ataka) and if one might be deemed to have occurred, it was excused by the Force Majeure exception. Moreover, NRC and PRC claim that Ataka breached the agreement in several respects, most importantly, by invoking the jurisdiction of the Canadian Bankruptcy Court to enforce the claims against NRC and PRC rather than resolving the dispute in the New York Courts.

As recently as April 15th, 1976, this Court in a related case (Sanko Steamship Company, Ltd. v. Newfoundland Refining Company Limited, Docket No. 76-7060), enforced a similar forum selection clause specifying the English Courts as the forum for settlement of disputes, by affirming the dismissal

of a complaint and vacation of an attachment. See also, Gaskin v. Stumm Handel, 390 F. Supp. 361 (S.D.N.Y. 1975).

It has been recognized that an agreement to arbitrate is a "specialized kind of forum selection clause" (Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)).

As far back as 1931 the New York Court of Appeals in Gilbert v. Burnstine, 255 N.Y. 348, 354-55 (1931), declared the policy of the State with respect to enforcement of a foreign forum selection clause:

"Defendants' agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby the law is there enforced. Otherwise the inference must be drawn that they never intended to abide by their pledge....

"Generally, extraterritorial jurisdiction of alien tribunals, however vigorously asserted is denied by us. Of its own force, process issued from the court of a foreign state against our citizen and served upon him here is void. Without his consent he cannot be made subject to it, but whenever he agrees to be bound by its service, his conduct presents a problem. Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the

standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions, or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or state affairs, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our courts are not interested except to the extent of preserving the right to prevent repudiation...."

See also, Marcus A. Heyman, Inc. v. B. E. Cole Co., 275 N.Y.S. 23 (1st Dept. 1934) (Contract required arbitration in New York); Elkin v. Austral American Trading Corp., 170 N.Y.S. 2d 131 (Sup. Ct. N.Y.Cty. 1957) (New York forum selection clause worded almost exactly as that in the Agency Agreement, enforced); General Phoenix Corp. v. Maylon, 88 F. Supp. 502 (S.D.N.Y. 1949); Lavan Pet. Co. v. Underwriters at Lloyds, 334 F. Supp. 1069 (S.D.N.Y. 1971).

The New York Legislature has recently given specific voice to its public policy relating to foreign court actions taken in violation of forum selection clauses. CPLR §5304 provides as one of the "other grounds" for non recognition of a foreign court judgment, those cases where:

"6. The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court."

It is recognized that this section deals only with money judgments, but the Legislature's intent is clear, the New York courts are not open for enforcement, as a matter of right, of foreign court orders where the foreign forum was invoked in violation of a forum selection clause.

Thus, it would appear clear that it is the law and the public policy of the State of New York to enforce valid forum selection clauses, and not lend the New York courts' assistance to violations thereof.

Here a New York corporation engaged in a conspiracy to breach a New York forum selection clause, entered into in New York, and in breach of that valid, enforceable clause, fraudulently procured the appointment of a Canadian Trustee, Clarkson -- itself a co-conspirator -- and then caused the Trustee to present himself to the New York Courts as the enforcer of the rights of NRC and PRC.

What happens to the rights of NRC and PRC under the forum selection clause?

Does this valuable contract right get lost in the "fast shuffle" of a clever conspiracy which, to this moment has accomplished its objective -- to breach the substantial provisions of the Agency Agreement and get away with it by also breaching the forum selection clause?

Contractual rights such as this one are "property" protected by the "due process" clause of the 14th Amendment to the U.S. Constitution (see Lynch v. United States, 292 U.S. 571, 577 (1934)) and the "equal protection of the laws", which extends to foreign corporations (Quaker City Cab Co. v. Penna., 277 U.S. 389 (1928) ("The equal protection clause extends to foreign corporations within the jurisdiction and safeguards to them protection of laws applied equally to all in the same situation."))

In Lynch v. United States, supra, the Court was presented with the withdrawal by the U.S. Government of the right of a holder of War Risk insurance to sue the government on the policy.

The Court held:

"Contracts between individuals or corporations are impaired within the meaning of the Constitution (Article 1 §10, cl.1) whenever the right to enforce them by legal process is taken away or materially lessened."

While holding that the U.S. Government could take away the remedy by way of sovereign right, it is clear that the state legislature or Courts cannot (Worthen Co. v. Thomas, 292 U.S. 426 (1934), cited and followed in Lynch; Shelley v. Kraemer, 334 U.S. 1 (1948)).

Here a valuable contract right -- freely bargained for by the parties -- is on the verge of being destroyed. It is

no answer to say the Newfoundland Court rendered a decision on this matter -- the parties did not bargain for a Newfoundland Court, they bargained for a New York Court. Only by reason of the breach of the forum selection clause was Atlantic able to invoke the Newfoundland Court's jurisdiction and get the Trustee, Clarkson appointed.*

NRC and PRC are most flagrantly being deprived of those rights by the action of the Court below in accepting Clarkson's standing before the alleged fraud and the New York public policy on illegally acquired claims and enforcement of forum selection clauses has been judicially explored.

The Trustee stands before this Court as the ultimate step in of the breach of the law and public policy of New York and a creature of Atlantic's breach of its New York contract with NRC.

As in the case of fraudulently procured foreign judgments, New York refuses to recognize foreign decisions, bankruptcy and otherwise, where the public policy and the rights of its citizens are impaired (emphasis added):

Cole v. Cunningham, 133 U.S. 107, 122-3 (1890):
("The rule in that State is, that by the comity of nations, the statutory title of foreign assignees in bankruptcy is recognized and enforced when it can be done without injustice to the citizens of the State, and

*"Contracts made [with respect to forum selection] by mature men who are not wards of the court should, in the absence of potent objection, be enforced." Gilbert v. Burnstine, 255 N.Y. 348, 354 (1931)

without prejudice to creditors pursuant to their remedies under the New York statutes, provided also that such title is not in conflict with the laws or public policy of the State....")

Vladikavkazsky Ry v. New York Trust Co., 263 N.Y. 369, 378 (1934): ("Where there is confliction between our public policy and comity, our own source of justice and equity as embodied in our public policy must prevail....")

Martens v. Martens, 284 N.Y. 363, 365-66 (1940) ("They [foreign judgments] must not contravene our public policy....")

Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375 (1955) ("Thus, under comity -- as contrasted with full faith and credit -- our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons....")

Regierungspresident Land Nord. W. v. Rosenthal, 232 N.Y.S. 2d 963, 966-67 (1st Dept. 1962) ("Granted such submission [to the jurisdiction of the foreign courts jurisdiction], our courts may nevertheless decline to recognize determinations of tribunals of foreign countries if they contravene our public policy.")

Reed v. Allen, 38 N.Y.S. 2d 970 (Sup.Ct. Kings Cty. 1942) ("They [foreign judgments] must not contravene our public policy.")

Ambatielos v. Foundation Co., 116 N.Y.S. 2d 641, 651 (Sup. Ct. N.Y. Cty. 1952) ("It follows that the agreement upon which the British judgment is based does not offend our public policy.")

In re Davis Will, 219 N.Y.S. 2d 533, 536 (Surr.Ct. Westchester Cty 1961; Aff'd 227 N.Y.S. 2d 894 (2nd Dept. 1962)) ("Here there is no claim of fraud, or lack of jurisdiction in the foreign court, but those who oppose the claim assert that the rendition of a judgment against a dead man is contrary to the policy of this state." Held, judgment not enforceable.)

This Court should take notice of the fact that:

(1) The only creditor who filed the bankruptcy petition was Atlantic -- as assignee of the Ataka America claims against NRC and PRC, all of which were incurred under the New York Agency Agreement (App. 24, 29; 159-60).

(2) The claim has been made that such assignments, made six weeks and two weeks before the bankruptcy proceeding was commenced were in violation of §489 of the New York Judiciary Law (App. 159-60).

(3) The application of Atlantic Trading was on a demonstrably false affidavit (App. 163).

(4) The ex parte appointment of Clarkson as Interim Receiver was on the sole application of Atlantic Trading (App. 163).

(5) With unexplained foresight, Clarkson knew in advance of the Canadian Court's ex parte order naming it as Interim Trustee: Clarkson's people entered the New York office of NRC and PRC shortly after the order was signed in Newfoundland, with a telecopy of the order in hand (App. 179).

(6) Accompanying Clarkson as its counsel were representatives of Skadden Arps et al, and Davis Polk and Wardwell (App. 179); within a few days thereafter in the State Court Action, Skadden Arps became counsel to Ataka America, Ataka Japan and Atlantic Trading; Davis Polk became counsel to Morgan Stanley & Co., Ataka's advisor. Not exactly what one would call an "independent" trustee.

The Court of Appeals of New York has recognized that the use of various parties (here, alleged co-conspirators) of the same law firm "supports a strong probability that [said parties]...were inextricably involved" (Watts v. Swiss Bank Corporation, 27 N.Y. 2d 270, 278, 317 N.Y.S. 2d 315 (1970)).

There is a charge before this Court of a fraudulent conspiracy -- but, as in the case of most conspiracies, only the "tip of the iceberg" has shown through. The careful concealment attendant to most conspiracies has kept most of the evidence hidden from the view of NRC and PRC -- the attention of the Court is directed to a two page document entitled "PROJECT WINNET" (App. 177) -- that being the internal name prophetically given the conspiracy by its members. Only by accident did this document fall into the hands of NRC and PRC.

PROJECT WINNET was the execution of a fraudulent conspiracy which was designed to and did breach the New York forum selection clause and wrongfully and illegally deprive NRC and PRC of the protection of the New York Courts.

Plaintiffs application to the Court below was another step in this carefully designed scheme, and without this Court's intervention PROJECT WINNET may indeed be carried out exactly as conceived.

It is respectfully submitted that all of these serious charges should have been subjected to some judicial scrutiny -- we believe that of the State Court -- before Clarkson was granted comity as an alleged Trustee of NRC and PRC.

(D) The Complaint below is fatally defective in that NRC and PRC are indispensable parties, the presence of which will destroy diversity jurisdiction

As indicated on page seven herein, this case was captioned as if it is a U.S. bankruptcy case, which, of course it is not.

It is a diversity case seeking only dominion over books, records and property of NRC and PRC in New York.

The Canadian bankruptcy proceedings are on appeal in Canada, as is the appointment of Clarkson as Trustee (App. 313-20).

The Canadian bankruptcy proceeding did not terminate the legal existence of NRC and PRC:

"Neither bankruptcy, nor cessation of business, nor dispersion of stockholders nor the absence of directors, nor all combined, will avail without more to stifle the breath of juristic personality." Petrogradsky etc. v. Nat. City Bank, 253 N.Y. 23, 31-32 (1930)

The appointment of Clarkson as Trustee in Canada did not, per se, create any rights to the books, records and property of NRC and PRC in New York. (See case cited on pages 17-18, supra.)

These companies which are both licensed to do business in New York are distinct legal entities in New York and are entitled to the equal protection of its laws.

It is submitted that no order affecting its books, records and property could be validly granted without such companies being properly summoned before the Court as parties to the action.

Federal Rule 19(a) provides in its relevant parts:

"(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if... he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest...."

The Canadian Bankruptcy Court's decision is on appeal; similarly, the appointment of Clarkson as Trustee is on appeal. The temporary restraining order and preliminary

injunction relate solely to two corporations -- distinct legal entities -- whose books and records have been ordered to be handed over to Clarkson without their being before the Court.

Certainly NRC and PRC each "claim an interest relating to the subject of the action", their books and records and property. Similarly, "the disposition of the action in... [their] absence may as a practical matter impair or impede...[their] ability to protect that interest."

Certainly the defendants, officers and directors of NRC and PRC, will be "subject to a substantial risk of incurring...inconsistent obligations by reason of...[their] claimed interest" of NRC and PRC. Should the Canadian bankruptcy order or Clarkson's appointment be reversed by the Canadian courts, these persons will be guilty of giving up books and records that do not belong to them -- they are the property of NRC and PRC.

Since NRC and PRC are resisting both the bankruptcy order and Clarkson's appointment as Trustee, they must properly be named defendants. Since this would place aliens on both sides of the case, the Courts diversity jurisdiction would be destroyed. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 3 L.Ed. 108 (1808); Dassigienis v. Cosmos Carriers, 321 F. Supp. 1253 (1970), aff'd, 442 F. 2d 1016 (2nd Cir. 1971).

Under such circumstances, Rule 19(b) provides:

"(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder."

Certainly the judgment below would "be prejudicial to the rights" of NRC and PRC if the Canadian bankruptcy order or Clarkson's appointment is upset on the pending appeal in Canada; and the prejudice cannot be "lessened or avoided". Clarkson has an adequate remedy in the State Court.

In Lewis v. Lewis, 358 F. 2d 495 (9th Cir. 1966), the Court held:

"Plaintiff...prays that the personal defendants be ordered to account to the plaintiff....But, as we view the original complaint, the contemplated accounting would not be limited to those corporations, for the property dealings to be inquired into would include such products of those corporations as have come into the hands of Charlesville Productions, Inc., Lewislor Enterprises, Inc., Toreto Enterprises, Inc., and Toreto Films, Inc....

"Another prayer of the complaint asks that the personal defendants be adjudged to hold '*** such property and its product as aforesaid upon constructive trust and be ordered to pay over and deliver to the plaintiff his just and proper share thereof as provided in the settlement agreement and as required by law.' The property and its product thus referred to, it seems to us, necessarily includes that property and product of J.C.P. Corporation and Lewislor Films, which has come into the hands of the personal defendants....

"....

"Applying the principles stated in State of Washington v. United States, quoted in note 4, [87 F. 2d 421, 427-428 (9th Cir.)] we think the conclusion is inescapable that, so construing the original complaint, all of these corporations were indispensable parties from the outset of the litigation. Each has an interest in the controversy which is not distinct and severable from that of the personal defendants. The court could not render justice between the personal parties, in the absence of the corporate defendants, for in their absence the court would be without power to order the corporations to account, nor could it impose a constructive trust upon any of their properties...." 358 F. 2d at 501)

So here, where the property (books and records and other property) of NRC and PRC are being dealt with, those corporations should be before the Court.

Where a proper bankruptcy proceeding has been instituted, and the bankrupt is before the Court, an action by the Trustee to recover the corporate records is of course proper (In re Byrd Coal Co. 83 F. 2d 190 (2nd Cir. 1936)). But it seems entirely improper for the foreign Trustee to bring an

action to recover such records without bringing the alleged bankrupts -- legal entities in New York -- before the Court*.

Clarkson has asserted that the failure to raise this point below somehow waived this jurisdictional question. Such is not the law. It has been held that both the trial and appellate courts have a duty to raise the point if not raised by the parties. Haby v. Stanolind Oil & Gas Co., 225 F. 2d 723, 724 (5th Cir. 1955); Brown v. Christman, 126 F. 2d 625, 632 (D.C. Cir. 1942); Moores Federal Practice §19.19.

(E) Clarkson's application in the State Court Action, being In Rem precluded the jurisdiction of the subsequently filed action below

Under normal circumstances, in. U.S. bankruptcy law, the trustee in bankruptcy makes a motion in any pending litigation in which he wishes to participate -- including pending derivative stockholders suits -- to be joined in the action. Meyer v. Fleming, 327 U.S. 161, 172 (1946) ("On removal of the cause the District Court will allow the claim to be amended by joining St. Louis Southwestern or its trustee.")

*In a proceeding for appointment of a corporate receiver, the corporation is an indispensable party (Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., 33 F. 2d 703, 709 (4th Cir. 1929)). It would appear that the same rule should apply when a foreign trustee is seeking recognition by way of comity as Trustee in New York, so as to get the records of the corporations of which it claims to be the trustee.

This case presented a considerably different situation, however. Clarkson, by Amended Verified Complaint dated March 8, 1976 (App. 238) (not March 12th as Clarkson alleged below (App. 379)), was named a co-defendant in the State Court Action (App. 204, 206). Clarkson has sought to denominate this as a "procedural ploy" to block Clarkson's action as Trustee (App. 238). However, Clarkson overlooks the fact that at the time the Amended Verified Complaint was verified (March 8, 1976), the plaintiffs therein, SNR Holdings Inc. and Shaheen Natural Resources Company could not possibly have known that (a) the Newfoundland Court was not going to accept the as yet unfiled proposals of NRC and PRC which named Coopers & Lybrand as Trustee (App. 265, 291); (b) the illegal claims of Atlantic were going to be allowed in violation of the forum selection clause of the Agency Agreement and §489 of the New York Judiciary Law; (c) as a result of the allowance of such claims, NRC and PRC would be declared bankrupt; and (d) Clarkson would be named Trustee in bankruptcy of NRC and PRC on March 12, 1976.

In any event, Clarkson, at the time it was named Trustee on March 12, 1976, was already a co-defendant in the State Court Action. Therefore, instead of seeking to intervene in the State Court Action (Hahlo v. Cole, 98 N.Y.S. 1049 (1st Dept. 1906)) Clarkson moved to be named plaintiff. As

hereinafter shown, the result in either case is the same. Clarkson's action was an in rem proceeding to take control of an intangible asset of NRC and PRC, the chose in action asserted in the State Court.*

The application of Clarkson, already a defendant in the pending State Action, was for an order:

"...substituting...[Clarkson], as trustee in bankruptcy for...[PRC and NRC] as the plaintiff in this action...and for such other and further relief as may be necessary to preserve the assets of the estate of... [PRC and NRC]and to ensure the equitable administration of the bankruptcy proceeding presently pending....[in Canada]. (App. 240)

The action in the State Court, regardless of the form thereof, was an action to acquire title to an asset -- a chose in action -- over which Clarkson, as purported Trustee of NRC and PRC, claimed actual or constructive possession. It was specifically stated to be in furtherance of the preservation of the assets of NRC and PRC. Thus, if

*Under the existing case law in New York, Clarkson's motion was totally improper. Holmes v. Camp, 227 N.Y. 635 (1919) (Trustees in liquidation charged with fraud; court held they should be joined as defendants); Van de Stegen v. Neuss Hesslein & Co., 270 N.Y. 55 (1936) (Trustee ordered admitted as co-plaintiff with bankrupt) Meyer v. Page, 98 N.Y.S. 739, 740 (1st Dept. 1906) (Trustee admitted as co-defendant); Seagrist v. Reid, 157 N.Y.S. 979 (1st Dept. 1916). Van der Stegen, Meyer, and Seagrist, were cited with approval in Meyer v. Fleming, 327 U.S. at 166, n.9; 167, n.12 and n.13.

Clarkson was granted comity as trustee, such an action was clearly in rem:

"Title to the claim vests, of course, in the bankruptcy trustee. He is in position to take control of the litigation. (Meyer v. Fleming, 327 U.S. 161 (1946)).

While that decision was based upon the Federal Bankruptcy Act, Clarkson's counsel informed the Court below that such was also the law of Canada (App. 53).

Barton v. Callaway, 165 F. 2d 877 (9th Cir. 1948), aff'd, 336 U.S. 132 (1949), clearly points up the difference between an in rem action by the trustee in connection with a pending state action and in personam action by the trustee.

The distinctions made by the Court of Appeals decision and the Supreme Court are critical to an understanding of the point raised here.

The Court of Appeals first pointed out that, under U.S. bankruptcy law, the Bankruptcy Court acquires full title and in rem jurisdiction to all of the debtor's property (emphasis added):

"The jurisdiction of the federal district courts sitting in bankruptcy is limited to matters conferred by statute expressly or impliedly. Such jurisdiction is paramount and exclusive in the administration of the bankrupt's estate. The basis of the court's

exclusive jurisdiction in rem is its actual or constructive possession of the debtor's property. It is not limited to the administration of property that belonged to the debtor without question, but extends to the determination of all questions of title or liens affecting the debtor's estate. It is not exclusive as to the right or title of a party not in bankruptcy to property not legally or equitably owned or claimed by the debtor. (165 F. 2d at 880)

The Court of Appeals reversed an injunction granted by the district court against an action pending in the state court because the suit was not the property of the bankrupt: thus, the property involved in the state court action -- which was an in personam action -- was held never to have come under the "exclusive" jurisdiction of the bankruptcy court:

"In entering the judgment in this case, annulling and staying proceedings in the state court, the bankruptcy court undertook in a summary proceeding to exercise exclusive jurisdiction in rem as to property that the trustee did not own but was seeking to acquire. The proceeding in the state court that was enjoined, and the jurisdiction that was annulled, were strictly in personam. It does not appear from this record that the bankruptcy court had any jurisdiction whatever of that controversy; but, conceding that it did, such jurisdiction was concurrent, not exclusive, and should not have been exercised in a summary proceeding.

"....

"Because the debtor's trustee has actual possession under its lease of certain tangible property of the South Western Railroad Company, the trustee claims to be in possession of all the property in controversy...." (165 F. 2d at 881)

"...The fallacy in the argument is this: In the case of a tangible res, there can be possession in fact as well as in contemplation of law; but in the case of something intangible, possession is purely a legal concept that manifests itself only through recognition of legal consequences. So far as pertinent here, the legal consequences of a debtor's possession of a tangible asset at the time of his bankruptcy are that his trustee in bankruptcy succeeds to the debtor's possession; and that the bankruptcy court, acquiring possession thereby, has summary jurisdiction in rem to adjudicate adverse claims respecting the asset. Therefore, for practical reasons, the law attaches to the ownership of intangible property the legal consequences of possession of a tangible res....

"It is well settled that the bankruptcy court has no summary or exclusive jurisdiction in rem of tangible property adversely held by a third party under a bona fide claim of ownership. The same is true of intangible property, except that ownership of the latter carries with it the legal consequences of possession...."
(165 F. 2d at 882)

Thus, this case makes it clear beyond any doubt that, if Clarkson was entitled to comity as Trustee in New York, so far as causes of action of NRC and PRC are concerned:

"...the law attaches to the ownership of intangible property [i.e., the choses of action asserted in the State Court action] the legal consequences of possession of a tangible res." (165 F. 2d at 880)

Clarkson's motion in the State Court was an application for possession of title to a chose in action, an in rem action -- regardless of whether the chose in action was in personam or in rem*. See Hirson v. United Stores, 34 N.Y.S. 2d 122 (1st Dept. 1942):

"...[P]laintiffs right to sue depends on his title, as legal successor of the corporation, to the chose in action which he asserts...." (125)

"As...liquidator he would seem to have title to the causes of action alleged in the complaint....

"...[S]uch title must be afforded full faith and credit....

"...the statutes of Delaware have vested him with title to the chose in action in suit...." (126)

It has long been established that where a trustee, in the administration of his trust, invokes the jurisdiction of a state court in an in rem proceeding, the Federal Court lacks jurisdiction to entertain a subsequently filed suit involving the res.

*An action to recover possession of a promissory note is in rem even though a subsequent in personam action may be necessary to recover thereon.

Clarkson first invoked the jurisdiction of the state court to acquire in rem jurisdiction over the property of NRC and PRC -- the chose in action there involved.

Clarkson thereafter invoked the jurisdiction of the court below to acquire the books and records of NRC and PRC in the possession of defendants as well as the property of NRC and PRC. The fact that the action below was cast as an injunction does not change the fact that it was seeking books, records, and property, it did not seek any relief against the individual defendants; if they they had no books, records or property of NRC nad PRC, no cause of action was stated against them. Clarkson was claiming assets it asserts were transferred to it by Canadian law (App. 55).

The books and records sought were, in many cases, the very documents establishing the cause of action in the state court action (App. 199).

It is submitted the court below lacked jurisdiction over the subject matter of the complaint under Princess Lida of Thurn and Taxis v. Thompson 305 U.S. 456, 465-66 (1939):

"...Certain it is, therefore, that if both courts were to proceed they would re required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may

proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals...." (Emphasis added; footnotes omitted)

Certainly it cannot be logically denied that Clarkson's action in the state court, made in its capacity as Trustee, was an action "to administer trusts, or liquidate estates"; the very relief it sought was for an order:

(a) substituting Clarkson as Trustee under a Canadian statute which it claims gives it title to the property of NRC and PRC (App. 240, 53, 54) and

(b) such other relief as may be necessary to preserve the assets of the estate to ensure the equitable administration of the bankruptcy proceeding (App. 240).

After requesting such relief in the State Court Action, how can Clarkson as Trustee rationally argue that it was not seeking to "administer a trust" or "liquidate an estate" -- two of the specific types of action held to be included in the rule of Princess Lida?

It is respectfully submitted that both the State Court Action and the subsequently filed actions below, were clearly in rem actions to administer trusts and liquidate estates and therefore the Court below lacked jurisdiction over the subject matter of the complaint.

(F) The District Court erred in not requiring Clarkson to give security upon issuance of the Temporary Restraining Order and Preliminary Injunction

Rule 65(c) of the Federal Rules of Civil Procedure is quite specific about security in connection with the granting of TRO's and Preliminary Injunctions:

"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained...."

Neither the TRO nor the Preliminary Injunction in the instant case made any provision for a security bond or

undertaking. This error is even more exaggerated by the fact that Clarkson is a Canadian corporation, it has no office in New York, it is not licensed to do business in New York and, most importantly, the Court has no evidence whatsoever that any damages which the TRO might cause would or could be collectible. For all the defendants know, Clarkson may be bankrupt.

The failure to require a bond has been held to be a "condition precedent" to the validity of an injunction Hopkins v. Wallin, 179 F. 2d 137 (3rd Cir. 1949).

On defendants' motion for a stay before this Court, the question of the absence of a bond was brought up by defendant for the first time. The Court indicated, by a question, that it had established a more liberal rule in the Second Circuit, citing the "Vesco" case.

This court's decision in International Controls Corp. v. Vesco, 490 F. 2d 1334 (2nd Cir. 1974) does not appear to support the District Court's failure to require a bond on the issuance of either the Temporary Restraining Order or the Preliminary Injunction.

This Court held that:

"...the District Court may dispense with security where there has been no proof likelihood of harm to the party enjoined."
(490 F. 2d at 1356).

Certainly such a holding must be predicated upon there being an opportunity for the party enjoined to offer such proof. Since the Temporary Restraining Order was entered ex parte, the Vesco case is not authority for the District Court's failure to require security from Clarkson. For the same reason Ferguson v. Tabah*, 288 F. 2d 665, 675 (2nd Cir. 1961) and Urbain v. Knapp Brothers Manufacturing Co., 217 F. 2d 810 (6th Cir. 1954) offer no support for the District Court's ex parte Restraining Order.

It should be noted that the Urbain case was a 2 to 1 decision with a specific dissent on the violation of Rule 65(c) requirement for security (217 F. 2d at 818), citing Hopkins v. Wallin, *supra*, and Chatz v. Freeman, 204 F. 2d 764 (7th Cir. 1953).

In Chatz v. Freeman, a situation almost identical to that presented here by the Temporary Restraining Order was involved (emphasis added):

"By the complaint, plaintiff, as trustee of the corporate bankrupt, seeks an accounting from said defendants and a disclosure of all their transactions and dealings with the Garland Construction Company, the bankrupt corporation, and asks for an order restraining and enjoining defendants from transferring encumbering or in any manner disposing of their interests in certain property, held in trust

*Cited with approval in Vesco, 490 F. 2d at 1356.

and otherwise, and further restraining them from transferring, paying out or in any manner disposing of any funds pertaining to any construction loans or projects in which the bankrupt may have an interest, until the further order of the court.

"In this appeal Freeman & Freeman seek to reverse the order of October 1, 1952, issuing a temporary restraining order, because no provision was made therein requiring appellee to give the security provided for in rule 65(c) of the Federal Rules of Civil Procedure...." (204 F. 2d at 765)

"It appears from the restraining order issued by the District Court on October 1, 1952, that its primary purpose was to maintain the status quo, pending the adjudication of the issues presented by the complaint and answer, or until the further order of the court. This being a plenary action, summary jurisdiction does not attach, and a temporary restraining order should not issue without compliance with rule 65(c). To us, the rule seems plain, definite and unmistakable. There is nothing ambiguous about it.

"We conclude that the trial court committed error in issuing the temporary restraining order without providing for security as required by rule 65(c) of the Federal Rules of Civil Procedure. The judgment appealed from is reversed, and the cause is remanded." (204 F. 2d at 768)

The dissenting judge did not disagree with the majority, he indicated that because a United States Bankruptcy Trustee was the plaintiff, and Rule 65 did not apply to proceedings in bankruptcy, it should not apply to plenary suits by the Trustee.

See also Robinson v. Benbow, 298 F. 561, 572 (4th Cir. 1924) (Bond held required under provisions of Clayton Act [28 U.S.C. §382] which are almost identical with the provisions of Rule 65(c)).

Actually, a careful reading of the result in Vesco indicates that it supports defendants contentions herein. There the Court noted that the vessel in question, the "Patricia III" was undergoing repairs in a dry dock in Miami; the vessel had also been seized by the United States customs. In response to the matter of there being no bond, the Court noted "...even were the restraint lifted, Andean would be unable to remove the yacht because of...[the] forfeiture action..." However, when it was called to the Court's attention that the forfeiture claim had been denied and if certain claims against the vessel were paid "[Andean] would be barred from removing the Patricia III only by the preliminary injunction granted below"; it remanded the case for "reconsideration of the motion for security." (490 F. 2d at 1356)

The failure to require security on the issuance of the Preliminary Injunction appears to be open to at least as serious an objection as is the Temporary Restraining Order.

This Court, in the Vesco case cited above, had the following to say about Preliminary Injunctions:

"Although an extraordinary remedy, a preliminary injunction is properly granted to preserve the status quo pendente lite where the balance of hardships tips decidedly toward the party requesting the temporary relief and that party has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation....Moreover Judge Steward has narrowly fashioned the injunctive decrees so that it will not interfere with the operation of the aircraft. Accordingly, we do not find that the district court abused its discretion by enjoining the sale of the Boeing 707 pendente lite. (490 F.2d at 1347-48)

To the same effect is Moore's Federal Practice §65.04[1]:

"The general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action after a full hearing."

Moore cites, inter alia Checker Motors Corp. v.

Chrysler Corp. 405 F. 2d 319 (2nd Cir.), cert den. 394 U.S. 999 (1969) which affirms this position.

The preliminary injunction was in fact a mandatory writ, which the Court has the power to issue, but should do so sparingly. Moore, §65.04[1] says:

"But the power to issue such an interlocutory injunction which compels the defendant, in order to obey it, to take affirmative action should be sparingly used."

It is respectfully submitted that such power should not have been used in this case, where no bond was required.

The Court below, while casting the order in the form of an injunction, was actually issuing what amounted to a "turnover" order in a Federal Bankruptcy case. Property of

the debtor corporations was being ordered to be turned over to Clarkson, as Trustee, on the basis of a summary proceeding.

The nature of a "turnover" order was described by the Supreme Court in Maggio v. Zeitz, 333 U.S. 56 (1948) as follows:

"The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity." (333 U.S. at 61)

"In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by 'clear and convincing evidence,' the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act...." (333 U.S. at 63)

But the test for a preliminary injunction and a "turnover" order are quite different:

"It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by 'clear and convincing evidence,' Oriel v. Russell, 278 U.S. 358, 49 S.Ct. 173, 174, 73 L.Ed. 419, and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded against. It is the burden of the trustee to produce this evidence, however difficult his task may be." (333 U.S. at 64)

See also Collier on Bankruptcy, §23.10[1].

More important, however, is the fact that where assets of the debtor are required to be "turned over" as was ordered herein, the debtor is before the Court; the bonded trustee is an officer of the Court and subject to the Court's direction and control.

No such facts are here present. The debtors are not before the Court, the Trustee is not bonded and the Trustee is not answerable to the Court.

What remedies are available to NRC and PRC if the bankruptcy order or the appointment of Clarkson is reversed? No one but Clarkson knows where the records are and if Clarkson chooses to "walk out" of this jurisdiction, what can this Court do about it?

It has already been brought to this Court's attention that Clarkson was, by the Order of the Court below, directed to permit counsel to NRC and PRC to make copies of the documents ordered to be turned over to Clarkson at "convenient times and places" (Manning affidavit filed herein, April 14, 1976).

Clarkson immediately removed the papers from this jurisdiction to Toronto, Canada -- before any final judgment was entered herein -- which certainly cannot be said to be a "convenient" place for NRC and PRC's counsel to make copies.

The point has been made in argument before this Court on defendants' motion for stay that since a bond was not requested below, it has been waived. Rule 65(c) does not lend itself to such reading. Moreover, in the light of Clarkson's removal of the documents to Canada, a reconsideration would appear to be required by this Court's decision in the Vesco case, supra, 490 F. 2d 1356.

CONCLUSION

The case should be reversed and remanded to the District Court with orders to vacate the Temporary Restraining Order issued March 23, 1976, and the Preliminary Injunction issued April 1, 1976, and dismiss the complaint filed herein.

Respectfully submitted,

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